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No. 76-785

In the Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL WALKER, Governor of the State of Illinois, **DONALD PAGE MOORE**, Director, Office of Special Investigations, State of Illinois, and **LAURI STAPLES**,
Petitioners,

vs.

SAMUEL COLAIZZI, SAMUEL INDOVINA, THEODORE MAROS, RAMON SCULLY and **ZENITH ASSOCIATES, INC.**, an Illinois Corporation,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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ARGUMENT

I.
THE DECISION BELOW IS IN DIRECT CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT

Plaintiffs seek to combine their interest in reputation (unprotected by the Fourteenth Amendment, *Paul* v. *Davis*, 424 U.S. 693, 708 (1976)) with their interest in non-tenured public employment (also unprotected by the Fourteenth Amendment, *Bishop* v. *Wood*, ... U.S. ....., 96 S.Ct. 2074, 2080 (1976)) to create a hybrid interest which is protected by the Due Process Clause. They then argue that with such

a hybrid, the federal courts will allow them to circumvent the application of common law immunities. Each step of their argument is unfounded.

Plaintiffs correctly recognize that this Court's decisions in *Paul* v. *Davis,* 424 U.S. 693 (1976), and *Bishop* v. *Wood,* ..... U.S. ....., 96 S.Ct. 2074 (1976), established that neither a person's interest in reputation alone nor one's interest in non-tenured public employment alone arises to the level of an interest protected by the Due Process Clause. Having no direct holdings to rely upon, plaintiffs attempt to argue that *dictum* in those cases and in *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972), allows them to combine two non-protected interests into a viable federal cause of action.

Plaintiffs place much reliance on *Paul* v. *Davis,* 424 U.S. 693, 708 (1976), in which this Court interpreted *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), as standing for the proposition that defamation, when combined with "government action [which] deprived the individual of a right previously held under state law," justified the invocation of procedural safeguards. (Response, at 4-5). Here, however, the Seventh Circuit properly concluded (App. 4) that under applicable state law, plaintiffs had no protected property rights in their non-tenured positions as appointed subordinates of the Governor. *See Board of Regents* v. *Roth,* 408 U.S. 564, 577-578 (1972); *Adams* v. *Walker,* 492 F.2d 1003, 1007-08 (7th Cir. 1974). The Seventh Circuit's decision thus conflicts directly with this Court's conclusion in *Paul* v. *Davis* (424 U.S. at 712):

> "Respondent in this case cannot assert denial of any right vouchsafed to him by the State and therefore protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause."

The same conflict appears when the analysis begins with plaintiffs' employment interests rather than plaintiffs'

reputation interests. In *Bishop* v. *Wood,* ..... U.S. ....., 96 S.Ct. 2074, 2080 (1976), this Court held:

> "In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action [the firing of an untenured employee] was regular and, if erroneous, can best be corrected in other ways."

Here, plaintiffs do not allege that petitioners possessed the unlawful motivation proscribed in *Bishop* v. *Wood.* (App. 4-5). The Seventh Circuit's decision authorizing District Court intervention into state employment decisions thus conflicts directly with the holding of *Bishop* v. *Wood.*

II.

THIS COURT MAY PROPERLY CONSIDER THE POST-TERMINATION ADMINISTRATIVE HEARINGS AFFORDED PLAINTIFFS AND THE ADMINISTRATIVE DETERMINATIONS REACHED THEREIN

If plaintiffs can properly state a federal cause of action by combining two unprotected interests into one which is protected by the Fourteenth Amendment, a determination as to whether plaintiffs were afforded an administrative hearing which satisfied due process requirements becomes an important element in this case. See *Board of Regents* v. *Roth,* 408 U.S. 564, 573 n. 1 (1972); *Arnett* v. *Kennedy,* 416 U.S. 134, 157 n. 22 (1974); *Wood* v. *Strickland,* 420 U.S. 308, 326 (1975).

Plaintiffs (Response, at 3) admit the accuracy of the Petition's description of the hearings and determinations (Petition, at 6-7), but plaintiffs seek to cover-up both the fact that they were afforded statutory administrative hearings and the fact that those hearings resulted in administrative determinations substantiating the charges upon which they

base this suit,* on the grounds that the hearings transcripts and resulting determinations are not "of record" before this Court. (Response, at 3, 7).

The Court of Appeals' decision reveals that that court took judicial notice of the administrative decisions—as was required under Rule 201(d), Fed.R.Evid.—and that it merely "declined to determine the impact" of those decisions. (App. 10). The Court of Appeals' decision does not require this Court to close its eyes to the facts of this case.

Plaintiffs further seek to hide the administrative determinations by arguing that the Illinois Unemployment Compensation Act, Ill.Rev.Stat., 1975, Ch. 48, §640, forecloses the use of hearings and resulting determinations in this or any other court. (Response, at 7). The cited statute makes "information obtained from any individual or employing unit pursuant to the administration of [the Unemployment Compensation Act]" confidential, but such information is not essential to this Court's decision on the Petition, and we do not presently seek to bring it to the Court's attention. The statute does not, however, foreclose judicial notice of the very existence of hearings held under the Unemployment Compensation Act, and it does not foreclose judicial notice of the administrative determinations

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* Under this Court's recent *per curiam* decision in *Codd* v. *Velger,* ..... U.S. ....., 45 U.S.L.W. 4175, 4176 (U.S. Feb. 22, 1977), the truth or falsity of the charges placed against plaintiffs may be determinative of whether or not they are entitled to procedural safeguards. *See Arnett* v. *Kennedy,* 416 U.S. 134, 157 (1974); *but see Bishop* v. *Wood,* ..... U.S. ....., 96 S.Ct. 2074, 2080 (1976). Because the hearings which plaintiffs received concluded in administrative determinations affirming the truth of the charges about which plaintiffs now complain, those determinations (App. 12-16) are equally relevant to this case.

entered by the Hearings Referee. Under the circumstances of this case, we respectfully submit that this Court may properly and indeed should consider the administrative hearings and determinations.

III.

PLAINTIFFS' RELIANCE ON ARTICLE VIII, §4 OF THE ILLINOIS CONSTITUTION IS MISPLACED

Plaintiffs argue that petitioners are not entitled to immunity in this civil rights suit because Illinois has abolished the doctrine of sovereign immunity. (Response, at 10). Plaintiffs, however, are not suing the State. They are suing petitioners personally for allegedly defamatory statements made in the course of their official duties and responsibilities.

As the Court of Appeals correctly recognized (App. 8-9), executive officials in Illinois are protected against defamation actions by an absolute privilege. *Blair* v. *Walker,* 64 Ill. 2d 1 (1976); *accord, Barr* v. *Matteo,* 360 U.S. 564 (1959). The "immunity" question involved here is not whether sovereign immunity bars plaintiffs' suit against petitioners, but rather whether plaintiffs can circumvent application of the Illinois doctrine of absolute privilege of executive officers against defamation suits because of the fortuity that plaintiffs were discharged from office for misconduct at the same time their misconduct was made public. That issue raises the most serious of questions under the First and Fourteenth Amendments and under principles of federalism. We respectfully submit that plaintiff's sovereign immunity issue is a straw man, and that the privilege issues of substantial importance in this case are those described in the Petition (at 9-11).

CONCLUSION

For the foregoing reasons and for all the reasons stated in the Petition, petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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